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No. 83-1974

In The

Supreme Court of the United States

October Term, 1984

NORTH PLATTE BAPTIST CHURCH of North Platte, Nebraska, A Corporation; North Platte Christian School, North Platte, Nebraska; and Robert D. Gelsthorpe,

Petitioners,

v.

STATE OF NEBRASKA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A PARTY SEEKING TO RECOVER UPON A CLAIM MAY AT ANY TIME AFTER THE FILING OR ANSWER OR AFTER SERVICE OF A MOTION FOR SUMMARY JUDGMENT BY THE ADVERSE PARTY, MOVE WITH OR WITHOUT SUPPORTING AFFIDAVITS FOR A SUMMARY JUDGMENT IN HIS FAVOR.

II.

WHETHER THE JUDGMENT SOUGHT BE RENDERED FORTHWITH IF THE PLEADINGS, DEPOSITIONS AND ADMISSIONS OF FILE, TOGETHER WITH THE AFFIDAVITS, IF ANY, SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

III.

WHETHER A SUMMARY JUDGMENT IS A PROPER DEVICE TO DISPOSE OF A CONSTITUTIONAL CHALLENGE.

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WHETHER A STATE HAS THE POWER TO PASS REASONABLE REGULATIONS INVOLVING EDUCATION.

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Petitioners,

v.

STATE OF NEBRASKA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

STATEMENT OF THE CASE

The State of Nebraska ex rel. Lincoln County Attorney, (hereinafter, "plaintiff"), brought this action in the District Court of Lincoln County, Nebraska (hereinafter, "district court"), against the North Platte Baptist Church, North Platte Christian School and Robert D. Gelsthorpe (hereinafter, collectively, "defendants") seek-

ing a permanent injunction to prohibit the defendants from educating compulsory-aged school children in violation of eight separate state education laws and regulations. A copy of the petition is included herein as Appendix "A". The defendants admitted out-right five of the violations in their answer and admitted the material facts alleged in the other three violations but claimed they were not subject thereto because of alleged First and Fourteenth Amendment rights under the United States Constitution and their rights under Article I, Section 3, of the Nebraska Constitution. A copy of the defendants' answer is included herein as Appendix "B". The district court granted the plaintiff's motion for summary judgment and granted injunctive relief. The defendants appealed. The Nebraska Supreme Court affirmed in an opinion reported as *State ex rel. Kandt v. North Platte Baptist Church*, 216 Neb. 684, 345 N.W.2d 19 (1984).

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STATEMENT OF FACTS

The North Platte Baptist Church of North Platte, Nebraska, has been operating the North Platte Christian School (Answer:2) since January, 1979 (Answer:3). The school offers services for children in grades kindergarten through twelfth (Answer:2). The Church employs Robert D. Gelsthorpe (hereinafter, "Gelsthorpe") as Superintendent of the School (Answer:2). He is employed to supervise and guide the children in the school (Affidavit: Gelsthorpe). Gelsthorpe does not hold, nor has he applied for an Administrative and Supervisory Certificate or a Teachers Certificate (Answer:15). Certification is re-

quired by Neb.Rev.Stat. §§ 79-1701 and 79-1233 (Reissue 1981) (Answer:15,16). Neb.Rev.Stat. § 79-1701 (Reissue 1981) provides that all private, denominational, and parochial schools in the State of Nebraska, and all teachers employed or giving instruction therein, shall be subject to and governed by the provisions of the general school laws of the state so far as the same apply to grades, qualifications, and certification of teachers and promotion of pupils.

Neb.Rev.Stat. § 79-207 (Reissue 1981) requires each teacher to send a list of pupils enrolled and certain information regarding the pupils to the county superintendent. The petitioners admitted that they failed to file such reports (Answer:4a). Additionally, the petitioners failed to file with the Nebraska Department of Education transcripts of college credits earned by each teacher (Answer: 4f), as required by Rule 14 of the Nebraska Department of Education.

ARGUMENT

I.

The order of the District Court granting the plaintiff-appellee's motion for summary judgment should be affirmed.

A party seeking to recover in district court upon a claim may, at any time after the filing of answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor. Neb.Rev.Stat. § 25-1330

(Reissue 1979). The judgment sought shall be rendered forthwith if the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Neb.Rev.Stat. § 25-1332 (Reissue 1979); *Mutual Benefit Life Insurance Company of New Jersey v. Chisholm,* 213 Neb. 301, 329 N.W.2d 103 (1983); *Stolte v. Blackstone,* 213 Neb. 113, 328 N.W.2d 462 (1982); *Manzer v. Pentico,* 209 Neb. 364, 307 N.W.2d 812 (1981).

The pleadings and affidavits on file in the case at bar show that there are no genuine issues as to any material facts and that the plaintiff is entitled to a judgment as a matter of law. Where, as here, the allegations and admissions contained in the pleadings and the evidence offered at the hearing on the motion for summary judgment show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law, the motion should be sustained and summary judgment should be granted. *McGreevy v. Bremers,* 205 Neb. 554, 288 N.W.2d 491 (1980). A fortiori, the order of the district court granting the plaintiff's motion for summary judgment was properly affirmed by the Nebraska Supreme Court.

A. The pleadings and affidavits on file show that that there is no genuine issue as to any material fact.

Upon a motion for summary judgment, the court must examine the evidence, not to decide any issue of fact, but to determine whether any real issue of fact exists. *Bender v. James,* 212 Neb. 77, 321 N.W.2d 436 (1982); *Wilke v. Holdrege Coop Equity Exchange,* 200 Neb. 803, 265 N.W.2d

672 (1978); *Hubbell v. Farmers Insurance Group,* 200 Neb. 472, 263 N.W.2d 863 (1978); *Mecham v. Colby,* 156 Neb. 386, 56 N.W.2d 299 (1953). Summary judgment should be granted to the movant unless the opposing party offers competent evidence that there is a genuine issue as to a material fact. Defendants have offered no evidence that a material fact is at issue in this matter. To the contrary, the defendants admit all of the material facts in the pleadings and affidavits which they filed.

In paragraph 2 of their answer, the defendants admit that North Platte Christian School is a school operated by North Platte Baptist Church which provides educational services for children in grades kindergarten through twelfth. Plaintiff asserts in paragraph 3 of its petition that North Platte Christian School opened in January, 1979, has continuously operated since that time, and will continue to operate unless restrained and enjoined. In paragraph 4 of their answer, the defendants admit the aforementioned assertions contained in paragraph 3 of the petition.

Paragraph 4a of the petition alleges that the North Platte Christian School is being operated in violation of the school laws of the State of Nebraska by failing to make reports as required by Neb.Rev.Stat. § 79-207. In paragraph 4a of their answer, the defendants admitted the allegations contained in paragraph 4a of the petition.

Plaintiff alleges in paragraph 4e of the petition that the North Platte Christian School is operating in violation of Nebraska's school laws by failing to render a Fall Approval Report to the State Department of Education of the State of Nebraska as required by Rule 14-5(a) (i) of the rules and regulations of the State Department of Edu-

cation. In paragraph 4e of their answer, the defendants admit the allegations contained in paragraph 4e of the petition.

Plaintiff additionally alleges in paragraph 4f of the petition that North Platte Christian School is operating in violation of the school laws of Nebraska by failing to file with the State Department of Education a complete transcript of all credits earned by any teacher in that school as required by Rule 14-41 of the rules and regulations of the State Department of Education. The defendants admit the allegations contained in paragraph 4f of the petition as stated in paragraph 4f of their answer.

Plaintiff further alleges in paragraph 4g of the petition that North Platte Christian School is operating in violation of the school laws of the State of Nebraska by failing to seek initial approval status as an approved school system as required by Rule 14-(2) of the rules and regulations of the State Department of Education. Defendants admit such allegations in paragraph 4g of their answer. *As the defendants have admitted violations of the rules and regulations of the State Department of Education, their argument that such rules must be introduced into evidence is without merit.*

By admitting the allegations contained in paragraphs 2, 3, 4a, 4e, 4f, and 4g of the petition, the defendants have not brought into fruition any genuine issues of material fact. Further, the denials advanced in the defendants' answer do not raise any genuine issues of material fact.

In the affidavit of Robert D. Gelsthorpe received into evidence as Exhibit 4, defendant Gelsthorpe admits that his "religious convictions are such that it would be impossible for [him] to abide by the Nebraska School Laws

and Rules 14 and 21." (Paragraph 8.) In paragraph 9 of his affidavit Gelsthorpe acknowledges that the extent of his constitutional rights is at issue. Statements identical to paragraphs 8 and 9 of Gelsthorpes' affidavit appear in the affidavit of Dean and Jeanne Barney (Exhibit 5). The affidavits of Gelsthorpe and the Barneys certainly do not raise genuine issues of material fact, and if anything, show that the fundamental substantive issues involved focus upon the interpretation of the constitutional rights of the defendants. Such issues would pose questions not of fact, but of law.

As stated above, it is well established that upon a motion for summary judgment that the court must examine the evidence not to decide any issue of fact, but to determine whether any real issue of fact exists. The pleadings and affidavits involved in this matter do not demonstrate that there are any genuine issues of material fact involved. Therefore, the district court properly granted the plaintiff's motion for summary judgment because there are no genuine issues of material fact involved in this matter.

B. The State of Nebraska was entitled to judgment as a matter of law.

As was previously demonstrated *(see,* Section A), an examination of the record in this case demonstrates that there are no issues of material fact. Only issues of law have been presented. Further, the raising of constitutional defenses does not and of itself raise factual issues which must be resolved fully at trial. *Larson v. Board of Regents,* 189 Neb. 688, 204 N.W.2d 568 (1973). Summary

judgment is a proper device to dispose of a constitutional challenge. *D'Amico v. Board of Medical Examiners,* 112 Cal.Rptr. 786, 520 P.2d 10 (1974); *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E.2d 35 (1972). As no factual issues are raised by the defendants and only legal issues are presented to the court as constitutional defenses, judgment can indeed be rendered as a matter of law. And as will be demonstrated shortly, judgment as a matter of law was correctly rendered for the plaintiff.

Defendants cannot seriously contend that the Constitution of the United States denies the several states the power to pass reasonable regulations involving schools. Indeed, an ample line of precedent from the United States Supreme Court has established that the states do have the power to reasonably regulate schools, both public and non-public. *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Lemon v. Kurtzman,* 403 U.S. 602 (1971). As the Court stated in *Runyon v. McCrary,* 427 U.S. 160 (1976).

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. [Citations and footnote omitted.] Indeed, the Court in Pierce expressly acknowledged "the power of the State reasonable to regulate all schools, to inspect, supervise and examine them, their teachers and pupils. . . ." 268 US, at 534, . . .

Id. at 178-79.

The principles enunciated by the United States Supreme Court have been expressly adopted by the courts of Nebraska. *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed,* 454 U.S. 803 (1981). Despite this authority, defendants argue that *Faith Baptist* was somehow limited to its facts or the parties involved. However, to so argue is to completely ignore relevant decisions of the Nebraska Supreme Court. For example, in *Sileven v. Tesch,* 212 Neb. 880, 326 N.W.2d 850 (1982), the court stated:

> After announcing that we were considering Sileven's contention that his first and ninth amendment rights were violated, our opinion in *Faith Baptist* found that his first and ninth amendment rights were not being violated. That issue, insofar as it affects Sileven and the Faith Baptist Church, is no longer an open question in this jurisdiction, *and our decision in Faith Baptist has declared the law in this jurisdiction, no matter what anyone may argue to the contrary.* Our decision is final and binding. We have already found that Sileven and the Faith Baptist Church do not have a first amendment right to ignore the state's school laws. It is Sileven's choice to continue violating the lawful orders of the court which has resulted in his being held in contempt of court. *We specifically found that the state's right to regulate schools, including the Faith Baptist Church school, was a reasonable regulation* and did not impose an unreasonable burden upon Sileven's religious beliefs, nor violate his first or ninth amendment rights. Sileven is simply wrong if he believes that he may consistently and continually flout the law by merely declaring that it is contrary to his religious beliefs, no matter how sincerely held.

(Emphasis added.) *Id.* at 886, 326 N.W.2d at 853-54. It also should be noted that *Sileven v. Tesch,* was Sileven's attempt to be released from incarceration by writ of ha-

beas corpus. Sileven was a party to the *Faith Baptist* litigation; the opinion in *Sileven v. Tesch* by necessity addressed Sileven's rights in light of those rights having once been adjudicated.

More recently, the Nebraska Supreme Court has used language unequivocally indicating that *Faith Baptist* was not intended to be limited to its facts. In *State ex rel. Douglas v. Bigelow,* 214 Neb. 464, 334 N.W.2d 444 (1983), the defendant contended that state education regulations abridged her First, Ninth, and Fourteenth Amendment rights. This court responded:

> Again, the same constitutional claims which defendant makes here were analyzed and adjudicated adversely to her position in *Faith Baptist Church, supra,* and its predecessor, *Meyerkorth v. State,* 173 Neb. 889, 115 N.W.2d 585 (1962), *appeal dismissed* 371 U.S. 705, 83 S.Ct. 1018, 10 L.Ed.2d 125 (1963). No useful purpose would be served by restating the legal analyses and rationales for the rulings pronounced therein. Suffice it to say that the opinion of this court in *Faith Baptist Church, supra,* enunciates the law of Nebraska with respect to the constitutional issues presented by this case.

The Constitution of Nebraska, Article 1, Section 3, provides "No person shall be deprived of life, liberty, or property, without due process of law." The defendants, in their brief to the Nebraska Supreme Court, did NOT discuss how this constitutional provision was violated. Their entire argument, with respect thereto, appears on page 17 of their appellate brief to the Nebraska Supreme Court where the conclusion is made that the "Nebraska school laws and regulations, as applied to appellants, violate the appellants' right to freely exercise their religion and to direct the education and upbringing

of their children as guaranteed by Article I, Sections 1, 3, 4, and 26 of the Nebraska Constitution." It is well settled law in Nebraska that errors assigned but not discussed in the brief of the appellant or the brief of the appellee will not be considered by the Nebraska Supreme Court on appeal. Neb.Rev.Stat. § 25-1919 (Reissue 1979); Neb.Sup.Ct.R. 9D(1)d (Rev. 1982); *State ex rel. Douglas v. Bigelow,* 214 Neb. 464, 469, 334 N.W.2d 444 (1983). The reason is obvious. Equally obvious is the fact that no court could determine from the above quote if any constitutional provision was violated. Finally, defendants' argument that the Nebraska statutes and administrative rules violate the Nebraska Constitution are being made to the wrong court. The complaint is untenable.

Also untenable is the defendants assertion in paragraph 15 of their answer that the "Church has refused, for reasons of religious conviction, to submit their teachers to certification." Neb.Rev.Stat. § 79-1229 (Reissue 1981), which is cited by the defendants in paragraph 15 of their answer (Appendix "B"), does NOT require any church to submit their teachers to certification. Neb.Rev. Stat. § 79-1229 (Reissue 1981) declares:

> All persons holding the official title of (1) superintendent of schools, (2) principal or supervisor of an accredited school, or (3) supervisor of any special subjects or subject in which such persons actually supervise the work of other teachers in that subject or those subjects, shall hold either a Nebraska Administrative and Supervisory Certificate or a Nebraska Professional Administrative and Supervisory Certificate.

Thus neither paragraph 15 or any other paragraph in the defendants answer properly raise any constitutional

issue that can only be resolved by trial and the defendants have cited no such paragraphs in their petition for a writ of certiorari to this Court.

Likewise untenable is the defendants citation to *Ohlman, et al. v. Douglas, et al.*, CV82-L-467 (D.Neb. filed 1982). The defendants have patched together disparate portions of the court's preliminary opinion in that case. The end result is a broken-mirror image of the case which distorts rather than reflects the posture of that case. One need only consider that Attorney General Douglas and the other defendants in that case are governmental officials whereas in the case at bar the governmental officials are the plaintiffs. Simply stated, the issues in *Ohlman* are different from the issues in the case at bar. Thus *Ohlman* is not in point.

Perhaps comment should be made with regard to the statement on page 17 of petition for a writ of certiorari in this case that the defendants "have already been forced to suffer because of the lack of opportunity to present their constitutional and religious claims." It is submitted that if these defendants have suffered it is because of their own doing and not because of the laws of the State of Nebraska. As stated in *Prettyman v. State of Nebraska*, 537 F.Supp. 712, 715 (D.Neb. 1982):

> The challenged statutes do not prevent the plaintiffs from operating a school which inculcates their children with their religious convictions, they only require that the school meet the de minimis certification and attendance standards imposed on all Nebraska schools to ensure that the State meet its educational obligations to its young people. Under the precipitated more by obstinance than by the caprice circumstances here, plaintiffs alleged injury seems of the State.

The defendants in the case at bar seek a writ of certiorari of *State ex rel. Kandt v. North Platte Baptist Church,* 216 Neb. 684, 345 N.W.2d 19 (1984). It is to be noted that case is number 83-409 and that the opinion was filed March 2, 1984. It is also to be noted (see Appendix "C") that the defendants did NOT stay the mandate of the Nebraska Supreme Court in that case. Hence, the case at bar is moot.

There is yet another reason why the case at bar is moot. The defendants acknowledge that the Nebraska Legislature approved LB 928 on April 5, 1984. Defendants also acknowledge that LB 928 amends Neb.Rev.Stat. §§ 79-201, 79-328, and 79-1701 (Reissue 1981) and the same relieves the so-called high price they will need to pay for their alleged constitutional and religious liberties. It is, of course, well-settled law that where a statute has been amended during the pendency of an action it is reviewed as it presently stands, not as it once did. *Hall v. Beals,* 396 U.S. 45, 48, 24 L.Ed 2d 214, 90 S.Ct. 200 (1969); *Golden v. Zwickler,* 394 U.S. 103, 108, 22 L.Ed.2d 113, 89 S.Ct. 956 (1969). The defendants however, have totally failed to demonstrate in their petition for a writ of certiorari how LB 928 infringes upon any of their alleged constitutional and religious liberties. Consequently, the case at bar is indeed moot.

II.

Injunctive relief is a proper remedy where there is a continuous violation of statutes which act to protect public rights.

In *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed,* 454 U.S. 803 (1981), the Nebraska Supreme Court considered the appropriateness of injunctive relief in a case with extremely similar facts and pleadings. The petition for injunction in that case alleged the continuous nature of the violations and the need for protection of public rights in the exact same language as paragraph 6 of the plaintiff's petition in the case at bar. In reviewing the appropriateness of injunctive relief, the Nebraska Supreme Court stated:

> [A] court of equity may properly afford injunctive relief when there has been a continuing and flagrant course of violations of the . . . law. . . .

Id., 207 Neb. 806, 807, 301 N.W.2d 571, 575.

In the case at bar, as well as in *State ex rel. Douglas v. Faith Baptist Church, supra,* there was an admitted continuing and flagrant course of violations of the law. Indeed, in paragraph 4 of their answer (Appendix "B"), the defendants admit the assertions in paragraph 3 of the plaintiffs' petition (Appendix "A"), that the North Platte Christian School opened in January, 1979, and has continuously operated since that time. Defendants also admit in their answer to violations of numerous Nebbraska statutes and regulations as demonstrated previously in this brief. The school laws violated herein were enacted for the protection of the public welfare. A fortiori, the continuing and flagrant course of violations of such laws by the defendants were properly enjoined by the district court and the Nebraska Supreme Court.

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CONCLUSION

In their petition, the plaintiffs alleged the Defendants violated eight separate state education laws and regulations. The defendants admitted out-right five of the violations in their answer and admitted the material facts in the other three violations that were alleged in the plaintiffs' petition. Obviously, the defendants admitting to five of the violations in their answer is more than enough to sustain the injunction in this case. For any and all the reasons discussed herein, a writ of certiorari should be denied. The defendants (petitioners) have totally failed to make out a prima facie case.

Respectfully submitted,

STATE OF NEBRASKA, Respondent

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APPENDIX "A"

IN THE DISTRICT COURT IN AND FOR
LINCOLN COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel,
CHARLES L. KANDT, Lincoln
County Attorney,

Plaintiff,

vs

NORTH PLATTE BAPTIST CHURCH
of North Platte, Nebraska,
a Corporation; NORTH PLATTE
CHRISTIAN SCHOOL, North Platte, Nebraska; and
ROBERT D. GELSTHORPE;

Defendants.

PETITION

Comes now the plaintiff and for cause of action against the defendants and each of them alleges:

1. This action is brought in the name of the State of Nebraska by Charles A. Kandt, duly appointed, qualified and acting County Attorney of Lincoln County, Nebraska, who is charged by statute with enforcement of the laws of the State of Nebraska, with special reference in this proceeding to the laws pertaining to public and private schools.

2. Defendant North Platte Baptist Church of North Platte, Nebraska is a non-profit corporation, organized and existing under the laws of the State of Nebraska, with its principal place of business in North Platte, Lincoln County, Nebraska. Defendant North Platte Christian School is a private school operated by said North Platte

Baptist Church in North Platte, Lincoln County, Nebraska, providing educational services for children in grades kindergarten through twelfth. Defendant Robert D. Gelsthorpe is the minister and president of North Platte Baptist Church of North Platte, Nebraska, and superintendent and teacher of North Platte Christian School.

3. Defendant North Platte Baptist Church of North Platte, Nebraska is conducting, through its minister and Board of Directors, a private school in North Platte, Lincoln County, Nebraska known as North Platte Christian School, which school opened in January, 1979 and has been operated as a private school continuously, except for summer vacation, to this date, and will continue to be so operated unless restrained and enjoined.

4. North Platte Christian School is being operated in violation of the School laws of the State of Nebraska as follows:

a. Failing to make reports as required by Section 79-207 R.R.S. Nebraska.

b. Defendant Robert D. Gelsthorpe, superintendent does not hold a Nebraska Administrative and Supervisory Certificate or a Nebraska Professional Administrative and Supervisory Certificate as required by Section 79-1233 R.R.S. Nebraska 1943.

c. Defendant Robert D. Gelsthorpe is a teacher in said school without holding a Nebraska Teaching Certificate or permit issued by the Commissioner of Education as required by Section 79-1233 R.R.S. Nebraska 1943.

d. Failying to register teachers' or administrators' certificates in the office of the County Superintendent of the County of Lincoln

County, Nebraska, as required by Section 79-1239 R.R.S. Nebraska 1943.

e. Failing to render a Fall Approval Report to the State Department of Education of the State of Nebraska as required by Rule 14-(5) (a) (i) of the Rules and Regulations of the State Department of Education of the State of Nebraska.

f. Failing to have on file in the State Department of Education of the State or Nebraska a complete transcript of all college credits earned by any teacher in North Platte Christian School as required by Rule 14-41 of the Rules and Regulations of the State Department of Education of the State of Nebraska.

g. Failing to seek initial approval status as an approved school system as required by Rule 14-(2) of the Rules and Regulations of the State Department of Education of the State Department of Education of the State of Nebraska.

h. Failing to comply with the School Laws of the State of Nebraska in the operation of a private school.

5. Defendant Robert D. Gelsthorpe, in the capacity as minister and President of the corporation, North Platte Baptist Church of North Platte, Nebraska, is sponsoring North Platte Christian School and permitting the use of church property for the operation of said school. Demand has been made upon the defendant Robert D. Gelsthorpe superintendent of North Platte Christian School for information and requesting compliance with the school laws of Nebraska, but he has refused and neglected to furnish information or comply therewith.

6. The violations of the school laws of the State of Nebraska by the defendants are continuous and are being constantly repeated so that the remedy at law would require the bringing of successive and multiple actions, thereby rendering such remedy inadequate. Defendants have repeatedly stated that North Platte Christian School is not subject to the school laws of the State of Nebraska. The operation thereof violates the public policy of this State, and constitutes a continuing and flagrant course of violations of the school laws of the State of Nebraska. The protection of public rights and the welfare of the citizens, as well as the welfare of pupils attending said school, is sufficient to invoke the injunctive processes of this Court.

WHEREFORE plaintiff prays that the defendants and each of them be enjoined from further operation of North Platte Christian School or participation therein without complying with the school laws of the State of Nebraska, that a permanent injunction issue, and for such other and further relief as may be just and equitable.

STATE OF NEBRASKA, ex rel,
CHARLES A. KANDT, Lincoln
County Attorney, Plaintiff

/s/ CHARLES A. KANDT
Lincoln County Attorney

STATE OF NEBRASKA)
) ss.
COUNTY OF LINCOLN)

Charles A Kandt, being duly sworn upon oath, deposes and says that he has read the foregoing Petition,

knows the contents thereof, and that the facts contained therein are true.

/s/ CHARLES A. KANDT

Subscribed and sworn to before me Sept. 7, 1982.

/s/ Carol Te Poel
Notary Public

(Stamp)

APPENDIX "B"

IN THE DISTRICT COURT IN AND FOR
LINCOLN COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel,
CHARLES L. KANDT, Lincoln
County Attorney,

Plaintiff,

vs

NORTH PLATTE BAPTIST CHURCH
of North Platte, Nebraska,
a Corporation; NORTH PLATTE
CHRISTIAN SCHOOL, North Platte, Nebraska;
And ROBERT D. GELSTHORPE;

Defendants.

ANSWER TO PETITION FOR INJUNCTION

Come now the defendants and in answer to plaintiff's petition for injunction, state as follows:

1. Defendants admit the allegations contained in paragraph 1 of the Petition for Injunction;

2. Defendants admit the allegations of paragraph 2 of the Petition for Injunction but deny that defendant Robert D. Gelsthorpe is a teacher of North Platte Christian School.

3. Defendants deny that North Platte Christian School is a "private" school within the meaning the Nebraska statutes, it being instead a denominational school.

4. Defendants admit the allegations of paragraph 3 of the Petition for Injunction but deny the allegation that North Platte Christian School is a "private" school within the meaning of Nebraska statutes, it being instead a denominational school.

4a. Defendants admit the allegations of paragraph 4a of the Petition for Injunction.

4b. Defendants deny the allegations of paragraph 4b of the Petition for Injunction in that section 79-1233, R.R.S. Nebraska 1943 imposes no such requirement upon the defendants.

4c. Defendants deny the allegations of paragraph 4c of the Petition for Injunction.

4d. Defendants deny the allegations of paragraph 4d of the Petition for Injunction, in that section 79-1239, R.R.S. Nebraska 1943 imposes no such requirement on non-public schools, teachers or administrators.

4e. Defendants admit the allegations of 4e of the Petition for Injunction.

4f. Defendants admit the allegations of 4f of the Petition for Injunction.

4g. Defendants admit the allegations of 4g of the Petition for Injunction.

4h. Defendants admit in part and deny in part the allegations of paragraph 4h of the Petition for Injunction.

5. Defendants admit that Robert D. Gelsthorpe is the Minister and President of North Platte Baptist Church of North Platte, Nebraska, but deny that he "is sponsoring" North Platte Christian School and permitting the use of church property for the operation of said school. Sponsorship and ownership of the North Platte Christian School is entirely within the domain of the North Platte Baptist Church. Defendants admit that de-

mand has been made upon Robert D. Gelsthorpe for information and compliance with the school laws of Nebraska. Defendants deny the remaining allegations and demand strict proof thereof.

6. The allegations contained in paragraph 6 are conclusions of law to which no response is required.

AFFIRMATIVE DEFENSES

7. Defendant North Platte Baptist Church of North Platte, Nebraska, is an independent, fundamental Bible-believing and teaching Church, an integral part of the ministry of which is the operation of the Christian school. The Church ministry of North Platte Baptist Church includes North Platte Christian School, with Reverend Robert D. Gelsthorpe being responsible for the school as a ministry of the Church. The Church and its school are supported solely out of tuition and free will offerings of its religious supporters and receives no local, state or federal tax support.

8. North Platte Christian School:

(a) is a Christian ministry which is conducted as an integral part of the religious mission of the North Platte Baptist Church;

(b) is an institution whose dominant purpose is the inculcation of religious values;

(c) is an institution in which religion is so pervasive that it can be fairly said that the religious misson of the school is the only reason for the school's existence;

(d) is an institution whose affirmative, if not dominant, policy of instruction for school children is to assure

future adherents to the Christian faith by having control of their education at an early age;

(e) is housed in a building whose exterior contains identifying religious symbols, and whose interior, such as classrooms and hallways, contain Christian religious symbols, as well as inspirational quotations from scripture and other religious doctrinal sources;

(f) is an institution which has an atmosphere in which religious instruction and religious vocations are integral in the total educational function;

(g) employs teachers who are subject to the direction and discipline of religious authority which necessarily pervades the school;

(h) employs teachers who work in the school to inculcate the tenants of the Christian religion and who are dedicated to rearing children in that faith;

(i) employs teachers, all of whom are Bible-believing and practicing Christians;

(j) is operated in accordance with the convictions of its membership, sourced solely in its religion as required by the Bible, for the ultimate purpose of instructing the children in the philosophy and mandates of the scriptures, in such manner as to lay a biblically motivated educational foundation for the free choice of spiritual salvation and discipleship; and

(k) does not divide instruction into "religious" and "secular" components, the entire ongoing life of the Church-school community being religious.

9. Reverend Robert D. Gelsthorpe is an ordained minister of the gospel. As such, he is charged with the

duty to bear witness to the Lord and further religious mission of the Church through establishing and maintaining of a religious school.

10. Pastor Gelsthorpe has the duty to make decisions regarding the operation of North Platte Christian School of North Platte, Nebraska, in cooperation with other members of the church in order to fulfill the religious mission of the Church.

11. The ministry of the North Platte Baptist Church is centered on the biblical concepts that all men are sinners, and that the consequences of sin is eternal separation from God for eternity in literal hell and that this consequence can be avoided only in one way, by trusting in Jesus Christ, alone, for one's salvation. The members of North Platte Baptist Church further believe that salvation is a free gift by God to all who trust in Jesus Christ and that the fact of his death, burial and resurrection is a payment for all sins for those who only believe.

12. In observance of the commands of the Bible, defendants, as a matter of firm conviction and practice of the Church's membership, operate an educational ministry, which is conducted for the sole and ultimate purpose of spreading the Christian gospel's good news of the manner in which salvation is obtained, and teaching and growing in discipleship to the Lord Jesus Christ.

13. Primary teachers of North Platte Christian School are either college graduates or have college training. These teachers have embraced teaching in the moral and religious formation of the young as a Christian apostolate. All of the teachers employed in the school meet religious and other criteria set by the Church.

14. Compelled compliance with the requirements of Section 79-1233 R.R.S. Nebraska (Reissue 1976), Section 69-1239 R.R.S. Nebraska (Reissue 1976), and the regulations promulgated pursuant thereto would substantially limit and interfere with the religious mission of defendants by denying them freedom to select teachers and teaching methods according to the dictates of their religion.

15. Sections 79-1229 R.R.S. Nebraska (Reissue 1976) requires school administrators and supervisors to be certificated by the state. The Church has refused, for reasons of religious conviction, to submit their teachers to certification. Defendants believe that compliance, by personnel at schools which are not public schools or accredited schools, with requirements of the aforesaid statute is not required, but if required, would substantially limit and interfere with their duty to bear witness to the Lord and to further the religious mission of the Church. Defendants are unable, for reasons of religious conviction, to submit the North Platte Christian School to licensing (i.e. state approval). Defendants are willing to make available test results or various other information which will show that the school meets or exceeds the essential requirements imposed by Rule 14 of the rules and regulations of the State Department of Education of the State of Nebraska, and is in every way equivalent to the education provided in the public schools of Nebraska.

16. Section 79-1701 R.R.S. Nebraska (Reissue 1976) requires that:

> All private, denominational, and parochial schools in the State of Nebraska, and all teachers employed or giving instruction therein, shall be subject to and gov-

erned by the provisions of the general school laws of the state so far as the same apply to grades, qualifications, and certification of teachers and promotion of pupils. All private, denominational, and parochial schools shall have adequate equipment and supplies, and shall be graded the same and shall have courses of study for each grade conducted therein, substantially the same as those given in the public schools where the children attending would attend in the absence of such private, denominational, or parochial schools.

17. Section 79-1705 R.R.S. Nebraska (Reissue 1976) authorizes the county superintendent or public school officials to inspect private, denominational, and parochial schools for compliance with Sections 79-1701 through 79-1707 R.R.S. Nebraska (Reissue 1976). Section 79-1706 R.R.S. Nebraska (Reissue 1976) requires that pupils attending a school which is not in conformity with Sections 79-1701 through 79-1706 shall be required to attend public school. Section 79-1707 establishes penalties for violations of the provisions of Sections 79-1701 through 79-1706 R.R.S. Nebraska (Reissue 1976).

18. The imposition of the aforesaid requirements of Sections 79-1701 through 79-1707 R.R.S. Nebraska (Reissue 1976), as well as imposition by plaintiffs upon defendants of Section 79-207 R.R.S. Nebraska (Reissue 1976), Sections 79-1229 R.R.S. Nebraska (Reissue 1976), Section 79-1233 R.R.S. Nebraska (Reissue 1976), and Section 79-1239 R.R.S. Nebraska (Reissue 1976), and application of any regulations promulgated pursuant to their statutes violates the Free Exercise Clause of the First Amendment to the United States Constitution inasmuch as:

(a) Defendant, Rev. Robert D. Gelsthorpe will be deprived of his liberty to freely carry out his religious mission in the form of Christian education;

(b) The Church then will be deprived of its liberty to freely carry out its religious mission in the form of Christian education;

(c) The evangelical ministry of the Pastor, Church, and teachers associated with the North Platte Christian School as realized in their religious mission of the school in their charge will be chilled in its exercise, if not destroyed; and

(d) there exists no compelling state interest to justify their violations of defendants' religious liberty or, if such interest does exist, those requirements do not represent those means least restrictive of religious freedom available to assure such interest. In particular, there exists no body of empirical proof that state certification of teachers or administrators is necessary to good education.

19. The imposition by plaintiffs upon defendants of the aforesaid statutory requirements and rules upon defendants violates Article I, Section 4 of the Nebraska Constitution inasmuch as:

(a) said requirements burden the liberty of defendants to carry out their religious responsibilities according to the dictates of their religious beliefs;

(b) said requirements unduly burden and restrict religious education; and

(c) there exists no compelling state interest to justify these violations of the plaintiffs' religious liberty.

20. The imposition of the aforesaid statutory requirements upon the religious educational ministries of

the defendants violate rights guaranteed to defendants by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, inasmuch as defendants will be arbitrarily deprived of rights of property and enterprise, and further will be denied the benefits of a non tax-supported educational enterprise to which they have devoted money and contributed personal services to help create and maintain.

21. Section 79-328(5)(c) R.R.S. (Reissue 1976) authorizes the State Board of Education to:

> . . . establish rules and regulations based upon the program of studies, guidance services, the number and preparation of teachers in relation to the curriculum and enrollment, instructional materials and equipment, science facilities and equipment, library facilities and materials, health and safety factors in buildings and grounds, and procedures for classifying, approving, and accrediting schools, for approving the opening of new schools, for the continued legal operation of all schools, . . .

22. The power to establish rules and regulations which is granted to the State Board of Education by Section 79-328(5)(c) R.R.S. (Reissue 1976), is unreasonable, arbitrary, and vague, and is therefore violative of rights guaranteed to defendants by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

23. Rule 14, which has been promulgated by the State Board of Education pursuant to Section 79-328(5) (c) R.R.S. (Reissue 1976), establishes regulations for the approval of public and nonpublic schools. Only those schools which are approved pursuant to the criteria established by this rule may be considered to be provid-

ing a program which is in compliance with the compulsory attendance laws.

24. Rule 14 establishes extensive and exhaustive requirements relating to courses of study, program preparation, assignment of teachers, and use of instructional materials and equipment in secondary and elementary schools. Compliance with these requirements would substantially limit and interfere with rights of religious liberty and rights of property and enterprise which are guaranteed to defendants by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Nebraska Constitution.

25. The Nebraska Legislature has no authority under the Nebraska Constitution to pass statutes and regulations applicable to defendants, or other private, denominational or parochial schools, nor is the Legislature empowered by the Nebraska Constitution to grant to the State Board of Education the authority to promulgate rules and regulations applicable to defendants, or other private, denominational or parochial schools. The aforementioned statutes and regulations as applied to defendants are ultra vires of the State of Nebraska, as Article VII, Section 1 of the Nebraska Constitution gives the Legislature power only in respect to the common schools of the state, or educational institutions owned and controlled by the state or political subdivision thereof, and Article VII, Section 2 of the Nebraska Constitution gives the Department of Education the power to supervise and administer only the public school system, or activities the Legislature may direct as limited by Article VII, Section 1 of the Nebraska Constitution.

26. The Nebraska school laws violate the defendants' right to free association and free speech as guaran-

teed by the Nebraska Constitution and by the First Amendment to the United States Constitution.

27. The Nebraska school laws as applied to these defendants violate defendants' right to direct the upbringing their children as guaranteed by the Nebraska Constitution and by the Ninth Amendment to the United States Constitution.

NORTH PLATTE BAPTIST CHURCH,
North Platte, Nebraska, et al.
Defendants.

/s/ Richard W. Moore
Charles E. Craze
Jerome C. Webbs
GIBBS & CRAZE CO., L.P.A.
6929 W. 130th-Suite #600
Cleveland, OH 44130
(216) 845-6800

George Clough
CLOUGH & HAYS
108 E. 2nd Street
North Platte, Nebraska 69101
(308) 534-5623

CERTIFICATE OF SERVICE

Your undersigned hereby certifies that a true copy of the above and foregoing Answer to Petition for Injunction was served upon counsel for the adverse party by personally handing same to counsel of record for said adverse party, to-wit:

Charles A. Kandt
Lincoln County Attorney
Lincoln County Courthouse
North Platte, Nebraska

on this 8th day of October, 1982.

George E. Clough

APPENDIX "C"

Nebraska Supreme Court
Form No. D-001 New 1/80
Mandate: GENERAL

Date: March 23, 1984

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

To: District Court of Lincoln County, Nebraska
WHEREAS, in late action in your court, captioned:

State ex rel., Charles A. Kandt, Lincoln
County Attorney, Plaintiff

vs.

North Platte Baptist Church of North
Platte, Nebraska et al., Defendants

you rendered judgment

And, WHEREAS, defendants

prosecuted an appeal to this court.

ON CONSIDERATION WHEREOF,

the judgment which you rendered has been affirmed by the Supreme Court.

Costs of this appeal are to be paid by appellants and are taxed at $50.00.

NOW, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

WITNESS the Honorable Norman Krivosha, Chief Justice, and the seal of this court.

(SEAL)

Kenneth A. Wade
Acting Deputy Clerk of the Supreme Court
/s/ Jan Culver
Deputy Clerk

Supreme Court No.
83-409

Trial Tribunal No.
84-85

Date Opinion Issued
3/2/84

COSTS IN SUPREME COURT

Costs due Clerk Supreme Court	$	-0-
Brief Fee due Appellant	$	
Brief Fee due Appellee	$	
Docket Fee due	$	
Due	$	
Due	$	
Paid by Clerk of the District Court	$	50.00
TOTAL COSTS	$	50.00

Costs should be distributed in accordance with
§ 25-1915 R.R.S. 1943

NEBRASKA SUPREME COURT
Form No. F-003
Rev. April 1983

SUPREME COURT)
) ss.
STATE OF NEBRASKA)

I certify that I have compared the foregoing copy of the mandate issued March 23, 1984, in the following case: No. 83-409, State ex rel., Charles A. Kandt vs. North Platte Baptist Church of North Platte, Nebraska with the original now on file in my office. The same is a correct copy of the original.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln, on September 19, 1984
(date)

Kenneth A. Wade
Acting Deputy Clerk
/s/ Kenneth A. Wade
Deputy Clerk